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Chin Min Hua & Ors v Eagaivallinayagi Ammal

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HIGH COURT (PENANG) — CIVIL SUIT NO 22–761 OF 2009
KENNETH ST JAMES JC
20 MARCH 2023

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Damages — Assessment — Order for assessment — Court of Appeal allowed defendant's counterclaim for removal of plaintiffs' caveat and damages — Assessment of damages by High Court — Whether defendant entitled to legal fees and expenses — Whether defendant entitled to damages for her loss of opportunity to sell land — Whether defendant entitled to general damages for loss of possession and use of land — Whether general damages should stop as soon as caveat withdrawn — Whether court should discount amount of general damages for period where caveat was rightfully entered by plaintiffs

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In year 2009, the plaintiffs had filed an action against the defendant for an order of specific performance of a contract for sale and purchase of the defendant's land, an order that the defendant to transfer the land to the plaintiffs, and damages. In counterclaim, the defendant applied for the removal of the plaintiffs' caveat on the land and for damages. The plaintiffs had initially won the case but on appeal, the Court of Appeal ('the CA') had ordered a retrial of the case. The plaintiffs had filed an appeal against the CA's decision, but the appeal was dismissed. Subsequently, after the retrial had ended, the plaintiffs had again won the case. However, the defendant did not give up and filed another appeal which ended in favour of the defendant whereby the CA had set aside the judgment of the High Court and ordered the defendant's damages to be assessed ('the second CA order'). The plaintiffs' appeal to the Federal Court was dismissed, hence, the matter proceeded with the present case ie, the assessment of damages. The defendant's claim for damages was as followed: (a) the legal fees that she had incurred — in respect of this claim, the plaintiffs argued that considering that the second CA order stated that only general damages were to be assessed, as such, the legal fees being special damages should not be assessed; (b) the loss of her opportunity to sell the land — with respect to this claim, firstly the defendant claimed that she had received an offer to sell the land in 2013 for RM1.3m but at the time, due to the existence of the caveat, she could not proceed with the transaction which led to her loss when she had to sell the land for RM600,000 in 2022, and secondly, there was a valuation report in year 2015 by Henry Butcher ('the 2015 valuation') that the value of the land in 2015 was RM1.5m; and (c) general damages for the loss of possession and use of the land — for this head of damages, the plaintiffs argued firstly that since the caveat was the cause of the loss and damage, damages must stop as soon as the caveat was withdrawn, secondly, that the general damages

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should be lowered because the defendant did not suffer any loss and damage during the period when the caveat was entered rightfully ie, when the High Court found in favour of the plaintiffs, and thirdly, the defendant failed to mitigate her losses.

Held:

(1) Although the second CA order stated that 'ganti rugi am' were to be assessed, and the CA's grounds of judgment stated that 'damages' were to be assessed, the court did not think that it was necessary nor was it helpful to analyse and deliberate this issue, and in this context, whether the defendant's legal fees incurred came under general damages or special damages. The CA clearly ordered the caveat be removed and for damages to be assessed for the loss and damage caused by the caveat. The court was of the view that it should adhere to general principles and assess the loss and damage that the defendant suffered based on the evidence. In assessing damages, the court had considered the fundamental principles such as the purpose of awarding damages was to place the defendant back in the position that she would have been in if the plaintiffs did not sue her, and secondly, the loss and damage resulting in the damages must not be too remote (see paras 32–33 & 44).

(2) In relation to the legal fees, the defendant produced seven legal bills dated May 2014 until December 2020 with the total amount of RM368,000. Based on the factual circumstances of the case, the court was of the view that legal fees and expenses should be a component of the damages awardable to the defendant because the defendant's legal fees and expenses were directly and foreseeably caused by the actions and conduct of the plaintiffs. Further, during the defendant's cross-examination, the plaintiffs did not put to the defendant that the legal fees were unreasonable or exorbitant. The court therefore awarded the sum of RM368,000 as a fair and reasonable sum for the defendant's claim for legal fees and expenses, in addition to the RM15,000 costs that were awarded to her (see paras 45–46, 52, 54–55 & 106).

(3) With respect to the defendant's loss of opportunity to sell the land, the defendant gave viva voce evidence about the RM1.3m offer to sell the land. The court found that the plaintiffs did not make sufficient challenge to the defendant's evidence regarding this offer and there was no material or ground given by the plaintiffs for the court to doubt the defendant's credibility or her probity. Further, the plaintiffs did not produce any rebuttal evidence to show that the market value of the land in 2013 was nowhere near RM1.3m. The court therefore found, on the balance of probabilities, that the defendant's evidence was sufficient to prove that there was an offer in 2013 for her to sell the land for RM1.3m. The court further decided to use the RM1.3m sum instead of RM1.5m

(based on the 2015 valuation) because the former was more conservative and hence more appropriate. The court assess the defendant's loss of opportunity to sell the land at RM1.3m less the sum of RM600,000 (the sale price of the land received by the defendant in 2022), as such, the court awarded RM700,000 to the defendant under this head of damages (see paras 65–68 & 72–73).

(4) The court disagreed with the plaintiffs' submission that damages must stop as soon as the caveat was withdrawn. When the defendant, in compliance with the High Court's judgment, transferred the land to the plaintiffs, she lost the land to the plaintiffs. It was a much worse circumstances than having a caveat on her land. The court found that the defendant could not deal with or use the land for the entire 26-year period ie, from the date the caveat was entered until the land was transferred back to her in 2022. The plaintiffs' argument that the defendant did not suffer any damages during the period when the caveat was entered rightfully was untenable because the CA had found in favour of the defendant against the plaintiffs on merits. The court found that the defendant had suffered a continuous loss and damage, for which she should be reasonably compensated. In addition, the defendant was in no position to mitigate her losses due to the existence of the caveat and the fact that she had lost her possession and ownership of the land to the plaintiffs. The court was of the view that RM400,000 was a reasonable sum to be awarded to the defendant for suffering the hardship, mental anguish, and emotional distress for the loss of the right to deal with land, and for the loss of the use, possession, and ownership of the land for 26 years (see paras 82–88 & 104).

(5) The court had initially ordered interest at 5%pa from the date of the second CA order until full payment but the court realised that such order was erroneous because the quantum of damages had yet to be determined on the date of the second CA order. The court should have ordered interest at 5%pa on the quantum assessed from the date of this order/award of damages (26 January 2023) to the date of full payment. The court therefore invited the Court of Appeal to correct this error so that interest would be calculated from the date of this order/award for damages until date of full payment (see paras 107–109).

[Bahasa Malaysia summary

Pada tahun 2009, plaintif-plaintif telah memfailkan tindakan terhadap defendan untuk perintah pelaksanaan spesifik bagi satu kontrak untuk penjualan dan pembelian tanah defendan, perintah supaya defendan memindahkan tanah tersebut kepada plaintif-plaintif, dan ganti rugi. Dalam tuntutan balas, defendan memohon pengeluaran kaveat plaintif-plaintif dari tanah tersebut dan untuk ganti rugi. Plaintif-plaintif pada mulanya telah memenangi kes tersebut tetapi atas rayuan, Mahkamah Rayuan ('MR') telah

mengarahkan perbicaraan semula kes tersebut. Plaintif-plaintif telah memfailkan rayuan terhadap keputusan MR tersebut, tetapi rayuan tersebut ditolak. Setelah itu, selepas perbicaraan semula tamat, plaintif-plaintif sekali lagi memenangi kes tersebut. Bagaimanapun, defendan tidak berputus asa dan memfailkan satu lagi rayuan yang berakhir memihak kepada defendan di mana MR telah mengenepikan penghakiman Mahkamah Tinggi dan memerintahkan ganti rugi defendan dinilai ('perintah kedua MR'). Rayuan plaintif-plaintif kepada Mahkamah Persekutuan telah ditolak, justeru, prosiding diteruskan dengan kes semasa iaitu penilaian ganti rugi. Tuntutan defendan untuk ganti rugi adalah seperti berikut: (a) yuran guaman yang telah ditanggungnya — berkenaan dengan tuntutan ini, plaintif-plaintif berhujah bahawa memandangkan perintah kedua MR menyatakan bahawa hanya ganti rugi am sahaja yang akan dinilai, oleh itu, yuran guaman sebagai ganti rugi khas tidak boleh dinilai; (b) kehilangan peluangnya untuk menjual tanah tersebut — berkenaan dengan tuntutan ini, pertamanya defendan mendakwa bahawa dia telah menerima tawaran untuk menjual tanah tersebut pada tahun 2013 pada harga RM1.3 juta tetapi pada masa itu, disebabkan kewujudan kaveat, dia tidak dapat meneruskan transaksi tersebut yang menyebabkan kerugiannya apabila dia terpaksa menjual tanah tersebut pada harga RM600,000 pada tahun 2022, dan kedua, terdapat laporan penilaian pada tahun 2015 oleh Henry Butcher ('penilaian 2015') bahawa nilai tanah tersebut pada 2015 ialah RM1.5 juta; dan (c) ganti rugi am untuk kehilangan pemilikan dan penggunaan tanah — untuk tajuk ganti rugi ini, plaintif-plaintif berhujah pertamanya bahawa memandangkan kaveat adalah punca kehilangan dan kerugian, ganti rugi mesti terhenti sebaik sahaja kaveat tersebut ditarik balik, kedua, bahawa jumlah ganti rugi am perlu diturunkan kerana defendan tidak mengalami apa-apa kehilangan dan kerugian semasa tempoh kaveat dimasukkan secara sah iaitu, apabila Mahkamah Tinggi membuat dapatan yang memihak kepada plaintif-plaintif, dan ketiga, defendan gagal untuk mengurangkan kerugiannya.

Diputuskan:

(1) Walaupun perintah kedua MR menyatakan bahawa 'ganti rugi am' akan dinilai, dan alasan penghakiman MR menyatakan bahawa 'ganti rugi' akan dinilai, mahkamah tidak fikir ianya perlu dan membantu untuk menganalisis dan mempertimbangkan isu ini, dan dalam konteks ini, sama ada yuran guaman yang ditanggung oleh defendan adalah di bawah ganti rugi am atau ganti rugi khas. Mahkamah Rayuan dengan jelas mengarahkan kaveat tersebut dikeluarkan dan ganti rugi dinilai bagi kehilangan dan kerugian yang disebabkan oleh kaveat tersebut. Mahkamah berpandangan bahawa mahkamah harus mematuhi prinsip am dan menilai kehilangan dan kerugian yang dialami oleh defendan berdasarkan keterangan. Dalam menilai ganti rugi, mahkamah telah mempertimbangkan prinsip asas seperti tujuan pemberian ganti rugi

adalah untuk meletakkan defendan kembali pada kedudukan yang sepatutnya dia ada jika plaintif-plaintif tidak menyamannya, dan kedua, kehilangan dan kerugian yang mengakibatkan ganti rugi tidak boleh terlalu jauh (lihat perenggan 32–33 & 44). A

(2) Berhubung dengan yuran guaman, defendan mengemukakan tujuh bil guaman bertarikh Mei 2014 sehingga Disember 2020 dengan jumlah keseluruhan RM368,000. Berdasarkan keadaan fakta kes, mahkamah berpendapat bahawa yuran dan perbelanjaan guaman harus menjadi komponen ganti rugi yang boleh diawardkan kepada defendan kerana yuran guaman dan perbelanjaan defendan adalah secara langsung dan boleh diramalkan disebabkan oleh tindakan dan kelakuan pihak plaintif-plaintif. Selanjutnya, semasa pemeriksaan balas defendan, plaintif-plaintif tidak menyatakan kepada defendan bahawa yuran guaman tersebut adalah tidak munasabah atau terlalu tinggi. Oleh itu mahkamah mengawardkan jumlah RM368,000 sebagai jumlah yang adil dan munasabah untuk tuntutan defendan bagi yuran dan perbelanjaan guaman, sebagai tambahan kepada kos RM15,000 yang diberikan kepadanya (lihat perenggan 45–46, 52, 54–55 & 106). B C D

(3) Berkenaan dengan kehilangan peluang defendan untuk menjual tanah tersebut, defendan memberikan keterangan viva voce mengenai tawaran RM1.3 juta untuk menjual tanah tersebut. Mahkamah mendapati bahawa plaintif-plaintif tidak membuat cabaran yang mencukupi terhadap keterangan defendan berhubung tawaran ini dan tiada bukti atau alasan yang diberikan oleh plaintif-plaintif untuk mahkamah meragui kredibiliti defendan atau kewajarannya. Selanjutnya, plaintif-plaintif tidak mengemukakan apa-apa keterangan sanggahan untuk menunjukkan bahawa nilai pasaran tanah tersebut pada 2013 adalah tidak sampai RM1.3 juta. Oleh itu, mahkamah mendapati, berdasarkan imbangan kebarangkalian, bahawa keterangan defendan adalah mencukupi untuk membuktikan bahawa terdapat tawaran pada 2013 untuk dia menjual tanah tersebut pada harga RM1.3 juta. Mahkamah seterusnya memutuskan untuk menggunakan jumlah RM1.3 juta dan bukannya RM1.5 juta (berdasarkan penilaian 2015 tersebut) kerana nilai pertama tersebut adalah lebih konservatif dan oleh itu lebih sesuai. Mahkamah menilai kehilangan peluang defendan untuk menjual tanah tersebut pada harga RM1.3 juta ditolak jumlah RM600,000 (harga jualan tanah yang diterima oleh defendan pada 2022), oleh itu, mahkamah mengawardkan RM700,000 kepada defendan di bawah tajuk ganti rugi ini (lihat perenggan 65–68 & 72–73). E F G H I

(4) Mahkamah tidak bersetuju dengan hujahan plaintif-plaintif bahawa ganti rugi mesti terhenti sebaik sahaja kaveat ditarik balik. Apabila defendan, dengan mematuhi penghakiman Mahkamah Tinggi, memindahkan tanah kepada plaintif-plaintif, dia kehilangan tanah

tersebut kepada plaintif-plaintif. Ia adalah keadaan yang lebih buruk daripada mempunyai kaveat di tanahnya. Mahkamah mendapati defendan tidak boleh berurusan atau menggunakan tanah tersebut untuk keseluruhan tempoh 26 tahun iaitu dari tarikh kaveat dimasukkan sehingga tanah tersebut dipindahkan semula kepadanya pada tahun 2022. Hujah plaintif-plaintif bahawa defendan tidak mengalami apa-apa kerugian dalam tempoh di mana kaveat tersebut dimasukkan secara sah tidak boleh dipertahankan kerana MR telah membuat dapatan yang memihak kepada defendan terhadap plaintif-plaintif atas merit. Mahkamah mendapati bahawa defendan telah mengalami kerugian dan kerosakan yang berterusan, yang mana dia harus diberi pampasan yang munasabah. Di samping itu, defendan tidak berada dalam kedudukan untuk mengurangkan kerugiannya disebabkan oleh kewujudan kaveat tersebut dan fakta bahawa dia telah kehilangan milikan dan pemilikan tanah tersebut kepada plaintif-plaintif. Mahkamah berpendapat bahawa RM400,000 adalah jumlah yang munasabah untuk diberikan kepada defendan kerana mengalami kesusahan, keperitan mental, dan tekanan emosi kerana kehilangan hak untuk berurusan dengan tanah tersebut, dan untuk kehilangan penggunaan, milikan, dan pemilikan tanah tersebut selama 26 tahun (lihat perenggan 82–88 & 104).

(5) Mahkamah pada mulanya telah memerintahkan faedah sebanyak 5% setahun dari tarikh perintah kedua MR sehingga pembayaran penuh tetapi mahkamah menyedari bahawa perintah tersebut adalah salah kerana kuantum ganti rugi masih belum ditentukan pada tarikh perintah kedua MR. Mahkamah sepatutnya memerintahkan faedah 5% setahun ke atas kuantum yang dinilai dari tarikh perintah/award ganti rugi ini (26 Januari 2023) hingga tarikh pembayaran penuh. Oleh itu, mahkamah menjemput Mahkamah Rayuan untuk membetulkan kesilapan ini supaya faedah akan dikira dari tarikh perintah/award untuk ganti rugi ini sehingga tarikh pembayaran penuh (lihat perenggan 107–109).]

Cases referred to

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465; [2014] 4 AMR 301; [2014] 6 CLJ 269, FC (refd)

Eagaivallinayagi Ammal v Chin Min Hua & Ors [2020] 2 MLJ 771; [2020] 4 CLJ 64, CA (refd)

Eu Sim Chuan @ Eu Sam Yan & Anor v Kris Angsana Sdn Bhd [2007] 1 MLJ 734; [2007] 2 AMR 81; [2007] 7 CLJ 89, HC (folld)

Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13; [2007] 4 AMR 195; [2007] 4 CLJ 293, CA (folld)

Liew Choy Hung v Shah Alam Properties Sdn Bhd [1997] 2 MLJ 309; [1997] 3 AMR 2145; [1997] 2 CLJ 601, SC (refd)

Ling Peek Hoe & Anor v Ding Siew Ching & Ors [2022] MLJU 157; [2022] AMEJ 0398; [2022] 7 CLJ 412, HC (folld)
Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors [1997] MLJU 310; [1997] AMEJ 0034; [1998] CLJ Supp 244, HC (refd)
MD Biomedical Engineering (M) Sdn Bhd v Goh Yong Khai [2021] 5 MLJ 408; [2021] 4 AMR 16; [2021] 6 CLJ 30, CA (folld)
Ting Sieh Chung v Hock Peng Realty Sdn Bhd [2013] 2 MLJ 90; [2012] AMEJ 0141; [2012] 1 LNS 574, CA (refd)
Yap Boon Hwa v Kee Wah Soong [2020] 1 MLJ 37; [2019] AMEJ 0938; [2019] 1 LNS 1157, CA (folld)

Legislation referred to

National Land Code s 329(1)

Sunita Sankey (with Vincent Tey) (Jublin Tan & Tey) for the plaintiff.
Darshan (with Samreet Sagoo) (Darshan, Syed, Amarjit & Partners) for the defendant.

Kenneth St James JC:

PRELUSION

[1] This case demonstrates the perseverance of a defendant-litigant.

[2] The plaintiffs sued the defendant in 2009 (14 years ago). The plaintiffs sought reliefs and remedies that included an order for the specific performance of a contract for the sale and purchase of the defendant's land, an order that the defendant transfers the land to them, and for damages.

[3] The defendant counterclaimed to have the plaintiffs' caveat on the land removed, and for damages.

[4] After the first High Court ('HC') trial, the plaintiffs won. The defendant appealed to the Court of Appeal ('CA'), in an endeavour to get her land back. The CA allowed her appeal, set aside the HC judgment and ordered a re-trial.

[5] The plaintiffs applied for and obtained leave to appeal to the Federal Court ('FC'). The FC dismissed the plaintiffs' appeal.

[6] After the re-trial, the plaintiffs won again. The defendant appealed again to the CA.

[7] The CA again allowed the defendant's appeal.

[8] The plaintiffs once more applied for and obtained leave to appeal to the FC. And again the FC dismissed the plaintiffs' appeal.

[9] After 14 years, the defendant got back her rights over the land. She now seeks the assessment of her damages.

THE CHRONOLOGY OF PERTINENT FACTS

[10] In May 1996 (on 23 May 1996), the defendant (as seller) and Chin Teik Yoon (as buyer) entered into a sale and purchase agreement for the land ('SPA'). The purchase price was RM213,673.60.

[11] Chin Teik Yoon later died. The plaintiffs are the beneficiaries of Chin Teik Yoon's estate.

[12] In August 1996 (on 16 August 1996), the plaintiffs lodged a caveat over the land.

[13] In October 2013 (on 11 October 2013) — the defendant was compelled to transfer the land to the plaintiffs to comply with the first HC judgment.

[14] On the same day (11 October 2013), the plaintiffs withdrew the caveat, so that the land could be transferred to the plaintiffs.

[15] It was not until January 2022 (on 24 January 2022), which was *26 years* after the initial sale and purchase, that the land was finally transferred back to the defendant.

THE CHRONOLOGY OF PROCEEDINGS, IN BRIEF

[16] December 2009 — the plaintiffs filed this suit. The reliefs included: the specific performance of the SPA; the vacant possession of the land; and damages. The defendant mounted a counterclaim. The reliefs sought in the counterclaim included: the removal of the plaintiffs' caveat; and for damages.

[17] September 2011 — after the first trial, the HC granted judgment in favour of the plaintiffs. The defendant appealed.

[18] May 2014 — the CA allowed the defendant's appeal and set aside the first HC judgment, and ordered a re-trial.

[19] May 2015 — the FC granted leave to the plaintiffs to appeal to the FC.

[20] January 2016 — FC dismissed plaintiffs' appeal.

[21] June 2017 — After the re-trial, the HC granted judgment in favour of the plaintiffs, and ordered specific performance of the SPA. The defendant again appealed.

[22] March 2018 — the CA allowed the defendant's appeal, set aside the HC judgment and ordered the defendant's damages to be assessed ('second CA order').

[23] October 2019 — the FC granted leave to the plaintiffs leave to appeal to the FC.

[24] December 2020 — the FC dismissed the plaintiffs' appeal.

FUNDAMENTAL PRINCIPLES GOVERNING THE AWARD OF DAMAGES

[25] The fundamental principle on damages is that damages must be proven, and not merely asserted. This fundamental principle is reinforced in the FC case of *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465; [2014] 4 AMR 301; [2014] 6 CLJ 269. The FC held:

> [31] *The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered.* The general principle governing the measure of damages has its origin in the words of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 where he said:
>
> > ... *that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.*

[26] The defendant submitted her claim for damages in the following three heads of damage:

(a) the legal fees that she incurred;

(b) the loss of her opportunity to sell the land; and

(c) general damages for the loss of possession and use of the land.

THE LEGAL FEES THAT THE DEFENDANT INCURRED IN REMOVING THE CAVEAT AND GETTING HER LAND BACK

[27] The defendant submits that she should be compensated with the legal fees and expenses that she incurred, namely her legal bills. Her legal bills were

incurred for resisting the plaintiffs' claim to take the land from her (through the claim for the specific performance of the SPA) and for counterclaiming to get her land back (through an order to remove the caveat and an order to return the land to her, and for the resultant damages).

[28] Firstly, the plaintiffs argue that according to the second CA order (dated 13 March 2018), only general damages are to be assessed. The plaintiffs' argued that legal fees are special damages and therefore should not be assessed.

[29] I find the plaintiffs' argument untenable. The terms of the second CA order include these terms:

(a) the defendant's appeal is allowed with cost;

(b) the HC judgment is set aside;

(c) the plaintiffs are ordered to remove the caveat which they entered on the land;

(d) the plaintiffs are ordered to transfer the land back to the defendant; and

(e) general damages ('ganti rugi am') are to be assessed.

[30] But in the CA's grounds of judgment, the CA pronounced that:

(a) the defendant's counterclaim is allowed;

(b) the caveat is to be removed; and

(c) 'damages' are to be assessed (without a distinction being made as to 'general damages' or 'special damages').

[31] The citation for the CA's grounds of judgment is *Eagaivallinayagi Ammal v Chin Min Hua & Ors* [2020] 2 MLJ 771; [2020] 4 CLJ 64. The CA held at MLJ p 788 that:

> [42] In the upshot, we had unanimously allowed the appeal by the defendant. The High Court order dated 9 June 2017 was set aside. The counterclaim was allowed wherein the caveat was to be removed and *damages to be assessed* by the judge. We also ordered that the transfer of the MOT to be executed within 30 days from the date of our decision, failing which, the senior assistant registrar is to execute the MOT. Costs of RM40,000 for here and below, subject to allocator fees and the deposit to be refunded.

[32] Although the second CA order stated that 'ganti rugi am' are to be assessed, and the CA's grounds of judgment stated that 'damages' are to be assessed, I do not think that it is necessary nor is it helpful to analyse and deliberate whether the CA ordered only general damages to be assessed, and in this context, whether the defendant's legal fees incurred comes under general

damages or special damages. The CA ordered the defendant's damages to be assessed. A

[33] The CA clearly ordered the caveat be removed and for damages to be assessed for the loss and damage caused by the caveat. I find that I should adhere to general principles and assess the loss and damage that the defendant suffered based on the evidence. B

[34] At this juncture, I would like to make a remark about one of the points of argument that both parties presented in the context of sub-s 329(1) of the National Land Code ('the NLC'). C

[35] Subsection 329(1) is set out below for reference:

> Section 329 Compensation for wrongful caveats, and limitation on repeated applications. D
>
> (1) *Any person* or body *who, wrongfully* or without reasonable cause, *secures the entry of*, or fails to withdraw, *any private caveat shall be liable to pay compensation to any person* or body *who thereby suffers any damage or loss*.

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[36] Both sides were arguing over the applicability of sub-s 329(1) of the NLC. The defendant submitted that as the CA ordered the caveat to be removed, she should be given the statutory damages under sub-s 329(1) that relates to the entry of caveats. F

[37] The plaintiffs, on the other hand, argue that to grant damages under sub-s 329(1), there must first be an express finding by the CA that the caveat was wrongfully entered. The plaintiffs argue that if there is no such express finding, then damages cannot be assessed for the caveat being on the land. G

[38] The parties also argued over the applicability of the case law authorities on sub-s 329(1) of the NLC. The case law authorities cited and argued over by the parties include the case of *Ting Sieh Chung v Hock Peng Realty Sdn Bhd* [2013] 2 MLJ 90; [2012] AMEJ 0141; [2012] 1 LNS 574 (CA), and the case of *Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors* [1997] MLJU 310; [1997] AMEJ 0034; [1998] CLJ Supp 244 (HC). H

[39] The parties argued over whether the caveat was rightfully entered, or entered 'wrongfully or without reasonable cause' (referring to the words used in sub-s 329(1)). The parties also argued over whether the plaintiffs had a caveatable interest when they entered the caveat. I

[40] In the midst of arguments, however, the parties conceded that these

A issues were never canvassed before the CA when the CA granted the second CA order in the defendant's favour.

[41] I find that these arguments by the parties revolving around the applicability of sub-s 329(1) would entail going behind the second CA order to consider issues such as whether the caveat was entered rightfully or wrongfully, or whether the plaintiffs had a caveatable interest.

[42] I therefore find that to assess the damages in this suit, it is unnecessary to consider and determine these issues. These issues that relate to sub-s 329(1) of the NLC are, to me, extraneous to this assessment of damages proceeding.

[43] The CA adjudged (and affirmed by the FC) that the plaintiffs' caveat on the land must be removed and the land is to be transferred back to the defendant, and that the defendant's damages are to be assessed. The CA already found the plaintiffs liable to pay damages. What I have been entasked to do is to assess, that is, to quantify the amount of damages that the plaintiffs have to pay the defendant.

[44] And to perform this task of assessing damages, I go back to fundamental principles such as:

(a) the purpose of awarding damages is to place the defendant back in the position that she would have been in if the plaintiffs did not sue her for the land — *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309; [1997] 3 AMR 2145; [1997] 2 CLJ 601; and

(b) and the loss and damage resulting in damages must not be too remote — *Lo Foi*.

[45] Coming back to this head of damage of legal bills incurred — the defendant produced seven legal bills, with dates from May 2014 to December 2020. The total amount of the bills is RM368,000.

[46] Considering the factual circumstances of this suit, I am of the view that legal fees and expenses should be a component of the damages awardable to the defendant. In other words, the legal fees incurred by the defendant, due to the acts or conduct of the plaintiffs, constitute the damages suffered by the defendant.

[47] The authorities that I am both guided by and bound to follow, include:

(a) *Yap Boon Hwa v Kee Wah Soong* [2020] 1 MLJ 37; [2019] AMEJ 0938; [2019] 1 LNS 1157 (CA);

(b) *MD Biomedical Engineering (M) Sdn Bhd v Goh Yong Khai* [2021] 5 MLJ

408; [2021] 4 AMR 16; [2021] 6 CLJ 30 (CA);

(c) *Ling Peek Hoe & Anor v Ding Siew Ching & Ors* [2022] MLJU 157; [2022] AMEJ 0398; [2022] 7 CLJ 412.

[48] In *Yap Boon Hwa*, the CA held that legal expenses incurred in litigation are recoverable as damages. The CA (through Justice Zabariah Yusof) stated:

> [2] ... *We allowed damages to the respondent/defendant, in the form of the claim for legal fees incurred in defending the action* of fraudulent misrepresentation.
>
> ...
>
> [24] ... *Having to defend the suit, to pursue the counterclaim, to prove the fraudulent misrepresentation of the second plaintiff* and in bringing witnesses for the trial had *resulted in the defendant having to incur legal expenses and fees. Hence such expenses are reasonable and recoverable*. (Emphasis added.)

[49] In *MD Biomedical*, the CA (through Justice Lee Heng Cheong):

(a) distinguished the costs of court proceedings from damages as a remedy in the proceedings; and

(b) propounded that where a party caused the other party to incur legal fees, the legal fees can constitute damages that are awardable to the successful party *in addition to* costs.

[50] The CA enunciated:

> [29] ... we find that the plaintiff's sole claim for 'total legal fees and disbursements of RM70,000' comes within the meaning of 'the tortious damage' and the 'forseeability test' as defined by *Lo Foi v Lee Ah Hong & Ors* and that *the claim for the legal fees is not too remote*.
>
> ...
>
> [32] *Had the defendant not lodged the caveat against the lands, the plaintiff would not have to expend legal expenses to protect and safeguard its legitimate interests in the lands*. These are expenses which the plaintiff was constrained to incur if not for the defendant's entry of wrongful caveats against the lands.
>
> ...
>
> [35] In any event, we are of the view that the plaintiff's *payment of legal fees amounting to RM70,000, is 'actual damage' suffered by the plaintiff in that the plaintiff had to incur this sum to remove and protect his interests in the lands and this is legitimately one of the heads of damages which an aggrieved person such as the plaintiff herein may claim* ... (Emphasis added.)

[51] In *Ling Peek Hoe*, the HC (Justice Su Tiang Joo), after lucidly analysing the authorities, held that:

A [78] The above authorities have made it clear that *legal fees are a specie of special damages which are claimable over and on top of costs.* (Emphasis added.)

B **[52]** I therefore find that the defendant's legal fees and expenses were directly and foreseeably caused by the actions and conduct of the plaintiffs. I hence award these sums as damages, in addition to the costs that were awarded to her.

C **[53]** The defendant incurred legal fees for approximately 14 years. The plaintiffs sued the defendant in 2009. When the plaintiffs sued the defendant, she had to get advice from her solicitors. She had to file not only her defence but also her counterclaim to remove the caveat and get her land back. She went through two HC trials, two CA Appeals, two motions for leave to appeal to the FC, and two FC Appeals.

D **[54]** In this assessment of damages proceeding, during the defendant's cross-examination, the plaintiffs did not to put to the defendant that the legal fees incurred by her all these years of litigation were unreasonable or exorbitant.

E **[55]** I find that the defendant's total legal fees and expenses of RM368,000 for all the proceedings and tiers of the courts that she had to go through for the span of 14 years of litigation, is fair and reasonable. I therefore award the defendant the sum of *RM368,000* under this head of damage.

F LOSS OF OPPORTUNITY TO SELL THE LAND

[56] The plaintiffs argue the same points under this head of damage.

G **[57]** The defendant could not deal with the land for *26 years* — from 1996 to 2022. The plaintiffs entered the first caveat over the land in *1996*. The defendant was compelled to transfer the land to the plaintiffs in *2013*. The land was eventually transferred back to the defendant in *2022*.

H **[58]** In the body of evidence is the international valuers: Henry Butcher Malaysia's Valuation Report on the land. The Report was dated 27 January 2015. Henry Butcher valued the land in January *2015* at *RM1.5m*.

I **[59]** Even though the defendant did not refer to this 2015 valuation report in her witness statement (examination-in-chief), her counsel represented to me that this 2015 Valuation Report was produced as evidence at the second HC trial, and was marked as exhibit 'D38'. The plaintiffs' counsel did not object to this representation. So, I take it that the 2015 Valuation Report is part of the body of evidence in this suit.

[60] The defendant testified that in 2013, she had an offer to sell the land for RM1.3m. She testified that she wanted to, but could not, sell the land at the time (in 2013) because the caveat was on the land, and the case was still in the midst of litigation — refer the defendant's witness statement, Q&A 12.

[61] The defendant testified, with supporting documentary evidence, that she sold the land in *July 2022* for RM600,000.

[62] In re-examination, the defendant reiterated that she could not sell the land in 2013 for RM1.3m because of the caveat. She testified that if she could have sold the land in 2013, she would have received more money ie RM1.3m, compared to the price of RM600,000 that she eventually sold the land for.

[63] The defendant also testified that she had to sell the land at the low price of RM600,000, because her 'health is not good'. She testified that if she could have sold the land in 2013, she would have received more money. But instead, she suffered a loss. In her own words, she was 'suffering loss', and 'I really lost on this'.

[64] The land was transferred back to the defendant in January 2022. By July 2022 (just six months after), the defendant had already sold her land for RM600,000. This, to me, is supporting evidence that instead of waiting for the property market to recover after the pandemic and for the land to appreciate in value over time — she wasted no time to sell her land because she needed the money.

[65] The plaintiffs did not make sufficient challenge to this evidence of the 2013 offer to sell at RM1.3m. In cross-examination, the plaintiffs' counsel asked the defendant to produce evidence of this RM1.3m offer. The defendant testified that she could not find a witness to testify to this fact. She conceded that she could not produce the documentary evidence of this offer.

[66] The plaintiffs were calling on the defendant to produce corroboration evidence and documentary evidence about the RM1.3m offer in 2013. But the defendant gave *viva voce* (oral) evidence about this offer. And the plaintiffs have given me no material or ground to doubt her credibility or her probity.

[67] Also, the plaintiffs did not produce any rebuttal evidence to show that the market value of the land in 2013 is nowhere near RM1.3m, such as a valuation report on the value of the land in 2013.

[68] I therefore find, on the balance of probabilities, that the defendant's

evidence is sufficient to prove that there was an offer in 2013 for her to sell the land for RM1.3m.

[69] To my mind, there are two alternative computations for the defendant's damages under this head of damage. One alternative is to take the 2013 offer to sell the land at RM1.3m and deduct from this sum the RM600,000 that she ended up selling the land for in July 2022, namely RM1.3m less RM600,000 = RM700,000.

[70] The second alternative is the take the 2015 Henry Butcher valuation of the land at RM1.5m and deduct the same sum of RM600,000 that she sold her land for, that is, RM1.5m less RM600,000 = RM900,000.

[71] I am of the view that the RM1.3m sum should be used, and not the RM1.5m. The evidence of the RM1.3m is, to me, more applicable and pertinent to the issue of loss and damage. The Henry Butcher RM1.5m valuation is just evidence that the value of the land in 2015 was RM1.5m. It is not evidence that the defendant was *offered to sell* the land at RM1.5m in 2015.

[72] Also, to use the RM1.3m sum is more conservative and hence more appropriate.

[73] And so, I assess the defendant's damages under this head of damage at RM1.3m less RM600,000 = *RM700,000*. I award damages of RM700,000 to the defendant under this head of damage.

GENERAL DAMAGES

Discounting or disregarding damages for a period of time

[74] The plaintiffs concede that general damages are payable, but argues that there should be a *period of time* that I should *discount or disregard* from the assessment of the quantum of damages. That period, submits the plaintiffs, is from: (i) the date of the caveat entry (16 August *1996*); and to (ii) the date the plaintiffs withdrew the caveat to permit the defendant to transfer the land to the plaintiffs in 2013 (11 October *2013*). (The defendant was compelled to transfer the land to the plaintiffs pursuant to the HC judgment after the first HC trial.)

[75] The plaintiffs argue that since the caveat was the cause of the loss and damage, damages must stop as soon as the caveat was withdrawn.

[76] With respect, I do not comprehend the legal rationale behind this argument. The caveat impeded the defendant from dealing with and using the

land. The plaintiffs withdrew the caveat just so that they could acquire the land, so that the land could be transferred to them. When the defendant, in compliance with the HC judgment, transferred the land to the plaintiffs, she lost the land to the plaintiffs. It was a much worse circumstance than having a caveat on her land.

[77] In effect, the plaintiffs want to take credit for withdrawing the caveat. They are asking for the loss and damage that they caused to the defendant to be, in the plaintiffs' words, 'discounted or disregarded' by their act of withdrawing the caveat. With respect, I find no favour in this argument.

[78] The defendant suffered the hardship, mental anguish and emotional distress throughout the period from when the caveat was entered in *1996*, and then the land was transferred in *2013*, until the land was eventually transferred back to her in *2022*. She could not deal with, or use, the land for the entire 26-year period.

[79] The plaintiffs have another argument about how I should discount or disregard any loss and damage attributable to the plaintiffs for a period of time. The plaintiffs argue that the defendant's counterclaim was filed in July 2010. The first HC judgment after the first HC trial was in favour of the plaintiffs. It was granted in *September 2011* (19 September 2011). So, the plaintiffs argue that the first caveat was rightfully entered, until the first CA order reversed the first HC judgment. The first CA order that reversed the first HC judgment was made in *May 2014* (12 May 2014).

[80] The plaintiffs argue that the defendant's damages should be lowered for this period, because in this period of time — after the first HC judgment until the first CA order, which reversed it — the caveat was deemed rightfully entered. And if the caveat was deemed rightfully entered in this period, the defendant's damages should be discounted or disregarded for this period.

[81] Put differently, the plaintiffs submit that for as long as the first HC judgment was in favour of the plaintiffs, and by extension, for as long as the second HC judgment was in favour of the plaintiffs (even though on both occasions the HC judgments were found by the CA to be wrong) — the defendant suffered no damages.

[82] Again, with respect, I do not comprehend the legal rationale of this argument. On both occasions (or periods of time), the CA, on the merits, found against the plaintiffs, and found in favour of the defendant.

[83] The plaintiffs are effectively submitting that the defendant suffered loss and damage in intervals. The plaintiffs submit that in the period of time that

A the first HC judgment was in effect, before it was reversed by the first CA order, and in the period of time that the second HC judgment was in effect, before it was reversed by the second CA order — this court should not award damages to the defendant. I am of the respectful view that this argument is somewhat artificial.

B

[84] The factual truth of the matter is that the defendant lost her right to deal with and to use the land for as long as the plaintiffs' caveats were in place. And then the defendant additionally lost possession and ownership over the land after she was compelled to transfer the land to the plaintiffs. I see it as a C continuous loss and damage, for which she should be reasonably compensated.

[85] The plaintiffs also argue that the defendant had a duty to mitigate her loss and damage, but that she did not so mitigate. But the plaintiffs do not point out how or in what manner the defendant could have mitigated her loss D and damage.

[86] I find that as the defendant could not deal with the land from *1996* until *2013* (for *17 years*) — due to the caveat — the defendant was in no position to E mitigate her losses.

[87] The defendant had to transfer the land to the plaintiffs in October 2013 (11 October *2013*). The land was eventually transferred back to her in January 2022 (24 January *2022*). Over and above not being able to deal with the land F for 17 years (due to the caveat), the defendant even lost possession and ownership of the land for eight years and three months.

[88] As the defendant lost possession and ownership of the land from 2013 to 2022 — because she had to transfer the land to the plaintiffs — the G defendant was no position to mitigate her losses.

[89] From the original sale transaction, the defendant only received RM21,367.36, which was the initial 10% of the original purchase price of RM213,673.60. Although all she ever received was this RM21,367.36, by the H plaintiffs' action and conduct, the defendant lost her rights to deal with the land, and she lost her rights to possession and ownership of the land, for 26 years.

[90] I find that the defendant suffered the hardship, and the mental anguish I and emotional distress of being deprived of the rights to deal with the land and subsequently the rights to possession and ownership of the land. I also find that the defendant suffered the hardship, and the mental anguish and emotional distress of having to endure the protracted litigation, and to finance it, for 26 years, which is more than 1/3 of her adult life (she is almost 85 years old.)

[91] There is case law authority on the amount of damages that was awarded to a successful party in circumstances that were somewhat similar to this suit. The case is *Eu Sim Chuan @ Eu Sam Yan & Anor v Kris Angsana Sdn Bhd* [2007] 1 MLJ 734; [2007] 2 AMR 81; [2007] 7 CLJ 89 (HC).

[92] In that case, the husband-and-wife plaintiffs owned a double storey bungalow. In March 1997, the defendant-company started to develop the land next to the plaintiffs' property. The defendant-company was constructing two 20-storey condominium blocks. The construction work caused damage to the plaintiffs' property, including the house. There were cracks on the house, the electrical systems failed and the water supply was badly affected.

[93] The damage was so severe that the plaintiffs and their family were compelled to move out. The house was not safe to live in. It was found that the plaintiffs suffered 'severe mental distress and hardship'. The health of the husband-plaintiff was also badly affected.

[94] In *Eu Sim Chuan*, the HC (Justice Azmel) held, at MLJ p 743 (para [20](8):

> (8) General Damages for mental distress, hardship etc
>
> There are ample evidence that *the damage to the property had caused severe mental distress and hardship to the plaintiffs thereby resulting in the health conditions of the second plaintiff to deteriorate drastically*. The whole members of the plaintiffs' family had faced great hardship, getting transferred from one house to another. The first plaintiff, who had personally supervised the construction of the house, must be feeling very painful and sad to see the house being damaged due to the activities carried out by the defendant. I allow the claim of *RM1,000,000* under this Item. (Emphasis added.)

[95] The defendant-company in *Eu Sim Chuan* appealed to the CA. The CA upheld the HC judgment. In particular, the CA affirmed the HC's award RM1m for 'mental distress and hardship'. The CA, in appeal case citation of *Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor* [2007] 5 MLJ 13; [2007] 4 AMR 195; [2007] 4 CLJ 293 (CA), held:

> [38] What was left for consideration was the issue of damages and the quantum ... *The injury suffered by the respondents here was certainly not remote as it was of a kind any reasonable man could have foreseen.* Guided by that principle the learned judge had accordingly ordered damages in the sum of RM6,306,242.43 against the appellant, with interest at the rate of 8% pa, on the amount awarded from the date of filing the suit to the date of realization.
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> [40] Before proceeding further, it is necessary to state that *the underlying object for the assessment of damages is to put an aggrieved party in the same position as he had occupied, prior to the time when the wrong was done on him* (see *Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors* [1980] 1 All ER 928; *Liew Choy Hung*

v Shah Alam Properties Sdn Bhd [1997] 2 MLJ 309; [1997] 3 AMR 2145; [1997] 2 CLJ 601). For special damages, losses which are actual, and unavoidable, invariably monetary awards too will be ordered so as to compensate him.

[42] *We found no error in the findings of the learned judge when he had ordered RM1,000,000 also as part of the general damages. Practitioners are well aware that general damages represent losses which are not easily quantifiable, with losses in the like of mental stress, hardship etc as suffered by the respondents, also falling under the heading*. There was ample evidence to show that the health of the second respondent indeed had taken a dive, due to the continuous and persistent mental distress of seeing their home slowly disintegrating, followed by further hardship when moving house.

[96] The distinguishing facts between *Eu Sim Chuan* and this suit is that the successful plaintiffs there resided in the bungalow on their land. The bungalow was damaged, to the extent that it was not safe to live in it. The plaintiffs there and their family had to move 'from one house to another'.

[97] In this suit, the defendant did not have her home on the land. The defendant did not live there. But the hardship, mental anguish and emotional distress that the defendant experienced are undeniable.

[98] But, as distinct from the facts in *Eu Sim Chuan*, the defendant suffered the additional hardship, mental anguish and emotional distress of the protracted litigation. In other words, the long period of time that the defendant lost the right to deal with the land, as well as the right to possession and ownership of the land, would have caused her additional hardship, mental anguish and emotional distress.

[99] The plaintiffs lodged the first caveat over the land in August 1996. This dispute between the parties started then. Since August 1996, the defendant could not deal with the land.

[100] The plaintiffs filed this suit in December 2009. It did not even conclude when the second CA order was finally made in the defendant's favour. There was still this assessment of damages proceeding yet to be determined. It finally ended when this award of damages was made in January 2023 (on 26 January 2023).

[101] The defendant suffered the hardship, and the mental anguish and emotional distress of more than 26 years of dispute and uncertainty (from 1996 to early 2023). Within the 26 years of dispute and uncertainty, there were over 13 years of prolonged litigation in all the tiers of the superior courts.

[102] The trial had to be conducted twice. There were two appeals at the level of the Court of Appeal. There were two motions for leave to appeal to the FC. There were two Federal Court appeal hearings. The litigation was still ongoing until the determination of this assessment of damages proceeding, which I consider to be part-and-parcel of this suit.

[103] Further, after receiving the small initial sum of RM21,367.36, the defendant endured the hardship, mental anguish and emotional distress of having to make outlay-after-outlay to finance the legal proceedings to recover her rights over her land.

[104] Guided by the case of *Eu Sim Chuan*, and its affirmation by the CA in *Kris Angsana*, it is my considered view that the sum of *RM400,000* is a reasonable sum to award the defendant for suffering the hardship, mental anguish and emotional distress for the loss of the right to deal with the land, and for the loss of the use, possession and ownership of the land, for 26 years.

CONCLUSION

[105] In conclusion, under the head of legal fees and expenses, I award the sum of RM368,000. Under the head of the loss of opportunity to sell the land, I award the sum of RM700,000. And under the head of general damages, I award the sum of RM400,000. I assess the total amount of damages at *RM1.468m*.

[106] I order costs of RM15,000 to be paid by the plaintiffs to the defendant by 24 February 2023.

ERROR IN THE ORDER FOR INTEREST

[107] I ordered interest at 5%pa on the quantum assessed from the date of the second CA order, which was 13 March 2018, until full payment.

[108] But I realise now that this was a mistake. I should not have ordered interest to run from the date of the second CA order until full payment, because the quantum of damages has yet to be determined then. I should have, instead, ordered interest at 5%pa on the quantum assessed ie RM1.468m from the date of this order/award of damages, which was 26 January 2023, to the date of full payment.

[109] I therefore invite the Court of Appeal to correct my error so that interest will be calculated from the date of this order/award for damages ie from 26 January 2023, until the date of full payment.

A *Order accordingly.*

Reported by Dzulqarnain Ab Fatar

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